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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-549

TRIANTAFYLLOS KOTAKIS,
Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY CO.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent respectfully submits the Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals which requests review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1975, and respondent prays said Writ be denied.

A. OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit has not been reported yet. The District Court for the Northern District of Illinois, Eastern Division, rendered

two pertinent opinions in the case. The opinion of March 29, 1974 entering summary judgment in favor of respondent which is not reported, is appended as Appendix A hereto. The opinion wherein the summary judgment previously entered was determined to be a final judgment, on April 26, 1974, is appended as Appendix B hereto.

B. QUESTIONS PRESENTED.

Respondent will comment hereinafter on the propriety of the questions formulated by petitioner for review.

C. STATUTORY PROVISIONS INVOLVED.

Respondent will comment hereinafter on the propriety and applicability of the statutory provisions which petitioner alleges are involved. Further, Respondent will discuss the following statutory provisions:

45 U. S. C. § 153 First (l).

45 U. S. C. § 153 First (h).

The texts of these statutory provisions are set forth in Appendix C hereto. Thereafter, in Appendix D are the citations of all cases and other authorities discussed in this Brief.

D. STATEMENT OF CASE.

Petitioner complains of the decision and award of the National Railroad Adjustment Board (Third Division) denying petitioner's claim brought before it as to a labor dispute involving the respondent and petitioner's collective bargaining representative. The decision and award were made by a "referee" pursuant to paragraph (1) of Section 3 First of the Railway Labor Act. 45 U. S. C. § 153 First (1).

1. The Referee's Opinion Sets Forth the Facts as He Found Them.

The facts as found by the Referee are set forth in his decision and award. They differ from the facts asserted by petitioner in a number of respects. Petitioner has set forth the opinion of the Board as it deals with the facts in Appendix A to the Petition.

The underlying facts of this case are contained in the written documents submitted to Third Division by the respondent and by the petitioner's collective bargaining representative.

Petitioner's rendition of the facts as set forth in the "Statement of Case" portion of his Petition are his own version of the incident. There are a number of facts which come entirely from the record before the Referee which are pertinent to this case. A brief statement of them follows:

(a) Steven Krinakis understood, spoke, read and wrote both English and Greek.

(b) Steven Krinakis filed an affidavit during the processing of the claim under the labor contract ("on the property" as petitioner terms it) which does not state that petitioner was threatened with jail if he failed to resign.

(c) Petitioner told three different stories as to how he came to be in possession of the brass bearings when apprehended and as to the threats made to him.

(d) Krinakis's affidavit, which was obtained by petitioner's attorney, verifies that indeed Krinakis and petitioner were told they had the option of resigning or going forward under the disciplinary provisions of the labor contract where charges would be made against them by the company under said disciplinary provisions.

2. The Record Does Not Agree with Petitioner's Contentions.

Petitioner has made certain allegations of fact which are not supported by the record. Petitioner says the respondent had not confirmed that respondent's property had been involved in the incident and later it was shown the bearings were not respondent's. However, the record does not show what was said about the bearings' ownership at the time of the discussion with petitioner, or what was known about them, or what was discovered thereafter. Secondly, the record does not show whether or not Lenhardt or Dangremond did or did not speak or understand the Greek language. Thirdly, petitioner's statement of the case (page 7 of the Petition) refers to "Referee Miller" as being involved in the claim at the Third Division when, in fact the record clearly shows only Irwin M. Lieberman to have been the Referee in the matter.

3. Petitioner Is Incorrect as to the Proceedings Below.

Petitioner's statements are also confused as to the particular orders which the District Court entered in this case. The orders were as follows:

(a) December 7, 1973, respondent's Motion to Dismiss Count III of the Complaint is granted.

(b) January 16, 1974, petitioner's Motion for Reconsideration of the order of December 7, 1973 is denied.

(c) March 29, 1974, respondent's Motion for Summary Judgment on Count I of the Complaint is granted and petitioner's Motion for Summary Judgment on Count I of the Complaint is denied.

(d) April 26, 1974, respondent's Motion for Entry of a Final Order as to the orders of December 7, 1973 and March 29, 1974 is granted.

E. REASONS FOR DENYING THE WRIT.

1. Petitioner Improperly Attempts to Argue the Merits of His Claim Against Respondent in His Petition for Writ of Certiorari.

Throughout this case, Petitioner has attempted to assert his somewhat varying version of the facts underlying his claim as the facts the Referee should have accepted. He does so again in the Statement of the Case. We submit that the Referee's fact finding decisions are not subject to judicial review. *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 at p. 263 (1965) ("Thus, there arises the question of whether the District Court may open the Board's findings on the merits . . . We hold it cannot."). This petition, we submit, brings before the United States Supreme Court an issue settled by it ten years ago.

Petitioner's contention (on page 9 of his Petition) that the Krinakis affidavit supports petitioner's contentions of coercion is quite improper. The Referee found to the contrary. Petitioner's attempts to assert to the Court his subjective considerations as to the sufficiency or weight of the evidence offered by either side, and his conclusions as to what the evidence showed, are likewise improper. The Railway Labor Act, Section 3 First (q), sets forth three very limited grounds on which the courts may review an award of the Railroad Adjustment Board, and none of the grounds permits the courts to review findings of fact by a Referee. 45 U. S. C. § 153 First (q).

2. Petitioner Has Asked for Review Solely on the Basis That the Award of the National Railroad Adjustment Board Deprives Him of Constitutional Rights and That the Board Did Not Give Proper Notice.

Petitioner claims that the award of the Board should be reversed as being completely without "foundation in reason or fact." See Petition at p. 11. However, the Petition presents to

the Court as questions to be reviewed only the constitutional issues of due process and equal protection and the statutory issue of notice of the Board's hearing pursuant to Section 3 First (j) of the Railway Labor Act. 45 U. S. C. § 153 First (j). He confuses us by referring to findings of fact yet using language and case law dealing with statutory grounds for review. The grounds for review under Section 3 First (q) of the Act do not refer to findings of fact at all. One of these grounds (that relating to whether the Board exceeded its jurisdiction) has been taken as referring to whether an award has a "basis rationally inferable . . . from the letter or purpose of the collective bargaining agreement," however, the judicial inquiry may deal only with interpretations of provisions of such agreements. *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 415 F. 2d 403 at p. 412 (5th Cir. 1969), *cert. den'd*, 396 U. S. 1008 (1969). There is no difference among the Courts of Appeal on this issue. Petitioner cites *Laday* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 422 F. 2d 1168 (7th Cir. 1970) as supportive of his position that this ground allows a review of the Board's findings of fact. It is not supportive, and clearly states, citing *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 415 F. 2d 403 at pp. 412-415 (5th Cir. 1969), that the railroad could not raise an issue concerning the merits of a matter after the Board had made an award thereon. *Id.* at p. 1171. In any event, *Laday* was not an action under Section 3 First (q). 45 U. S. C. § 153 First (q).

Petitioner contends that, under the facts as he views them, it must be found that petitioner was denied his right under the labor contract to have a representative of his collective bargaining agent represent him in the handling of grievances. However, there was no grievance at the time of the meeting between respondent and petitioner. Further, the Referee found, and it is not denied, that petitioner did not ask for a representative to be present.

Also, petitioner contends the allegation of coercion by him is enough to require the Referee to find that the collective bar-

gaining provisions as regards discharges governed the matter. (The Referee found that he was dealing with a resignation case rather than a dismissal and petitioner's argument "begs the question and must be rejected.") Again, since the petitioner only raises questions of procedural due process and equal protection, the contentions that the award is without foundation in reason or fact is not pertinent. 45 U. S. C. § 3 First (q).

3. The Fourteenth Amendment of the Constitution of the United States Has No Bearing on the Issues Presented for Review.

The Petition cites (in the section entitled "Statutory Provisions Involved") SECTION 1 OF AMENDMENT XIV OF THE CONSTITUTION OF THE UNITED STATES. Petitioner contends that the degree of proof which the Referee required petitioner to meet was such as to deny him equal protection of the law and due process of law. However, the Fourteenth Amendment only applies in matters where there is state action involved. *See generally, Shelley* v. *Kraemer*, 334 U. S. 1 at p. 12 (1947). It is frivolous to contend there was any state action in the matter here presented for review.

4. The National Railroad Adjustment Board May Properly Impose or Formulate Standards or Burdens of Proof in Arbitration Cases Before It Which Differ from those Imposed by Other Adjudicatory Instrumentalities Without Violating Amendment V of the Constitution of the United States.

The first viable question presented for review is whether the Board imposed a burden of proof on petitioner in the arbitration of his claim which denied him equal protection and due process of law under AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES. (There is no equal protection clause in AMENDMENT V.)

In his decision, the Referee did not hold that the burden of proof petitioner had to meet was that commonly known as "beyond a reasonable doubt." Rather, in discussing the matter, the Referee noted that petitioner's version was the only evidence he felt could possibly support the claim. He then cited a prior Board award where the statement was made that a claimant was required to show beyond a reasonable doubt that he was coerced into signing a resignation. The prior award also noted that coercion "cannot be established by inference . . . or by the confrontation of threatened disciplinary action as an alternative to his resignation." Actually, the Referee relied upon the portion of the prior award quoted above and said:

> "Since this is not a discharge case where the carrier must maintain the burden of proof, we look to petitioner for support for the claim. Except for the unsupported statement of claimant, we find nothing in the record to persuade us that the resignations were obtained through the use of coercion and duress." Petition, p. 5a.

Petitioner argues that the Referee violated certain tenets of due process because the Referee decided that petitioner's version of the incident was not affirmed by Mr. Krinakis. On Page 9 of the Petition, petitioner says, "This assertion was corroborated by the affidavit of Mr. Krinakis." (In fact, Krinakis' affidavit says that he was offered the option of resigning or having charges brought against him in accordance with the collective bargaining agreement and a hearing held "before the union." Nowhere does the affidavit deal with any contention that any statement was made in Greek or any other language that he or petitioner was given the option of resigning or going to jail.) However, the determination of whether or not the Krinakis affidavit supported petitioner's version of the incident was for the Referee to decide, and that decision is certainly not reviewable. *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 at p. 263 (1965). This is not a serious or important issue; the Court has already decided that findings of fact by the Referee are final and not subject to review.

Petitioner also argues that he "complied with the preponderance of the evidence standard of proof . . ." Petition at p. 10. Again, he contends the Krinakis affidavit supports him. Again, we must say that Krinakis' affidavit was adjudged not to support him, and that this finding is not reviewable by the courts.

Assuming the standard of proof imposed on petitioner by the Board was that of proof beyond a reasonable doubt, and that standard means to the Board what it means in criminal matters before courts of law, the question is whether there are special and important reasons under SUPREME COURT RULE 19 for granting petitioner a review on Writ of Certiorari as to the issue.

The Court of Appeals' discussion on the due process issues are set forth on page 8 of its opinion. Petition, p. 13a. It held the interpretation of collective bargaining agreements is for the Board. It alternatively held the Referee's interpretations were reasonable. We submit that there is nothing in the Court's opinion on this issue which would bring it within the limited grounds given as examples of the types of special and important reasons set out in RULE 19. Further, the Court of Appeals cited as authority for its statements the same case cited in this Brief so often, *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 at pp. 261-62.

The Court of Appeals then dealt with the contention that the award of the Board was without foundation by noting that the findings by the Referee (as to what the evidence presented to him showed) were not reviewable and, in any event, on the record before it the Court could not say the Board's award was without foundation, wholly baseless, or completely without foundation. Again, there is nothing in this portion of the opinion which justifies review.

Going on, the Court met petitioner's contention that the Board's award was without foundation because the Referee wrongly chose to apply the beyond a reasonable doubt standard of proof. See the Court's opinion at p. 9. Petition, p. 14a. The Court noted that it was not clear whether the Referee applied the standard. The Court also held that even if he did

apply that standard, and even if he should have applied the preponderance of the evidence standard, the Referee could properly have found that petitioner had not proven coercion. This because the Referee found that the only evidence of petitioner's alleged coercion was the self-serving statements of petitioner himself, while Krinakis (who spoke and understood Greek) did not attest to any coercion to petitioner or to himself. We again say that these statements of the Court do not raise any of the special and important reasons which RULE 19 of the Supreme Court requires.

The burdens and standards of proof imposed by the Board stem from its experience and expertise in matters of railroad law disputes. *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239 at p. 243 (1949), *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 at p. 263 (1965). This is why the courts leave such matters to the Board. Even in civil cases, plaintiffs in some jurisdictions are required to prove certain allegations by more than a mere preponderance of evidence when attempting to avoid the effect or terms of a document which plaintiff previously executed. *E.g.*, *Whitson* v. *Aurora Iron & Metal Co.*, 297 F. 2d 106, 110 (7th Cir. 1961) (fraudulent inducement was asserted as a defense in a suit on a contract). Surely, in the light of the varying degrees of proof different jurisdictions require in civil cases when a party attempts to avoid the effect or terms of documents previously executed by himself, there are no special and important reasons for granting this Petition for Writ of Certiorari on the claim that requiring more than a preponderance of evidence to prove a resignation was signed under coercion violates the due process provision of AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES.

5. Petitioner Failed to Raise the Issue of Notice Before the Board or the District Court.

We submit that petitioner is barred from raising the issue of the propriety of the notice received by him of the Board's hearings (45 U. S. C. § 153 First (j)) since the complaint did

not attack the failure of the Board to give notice and the matter was not argued before the District Court. The Court of Appeals agreed with this contention. Petition, p. 15a.

The Court of Appeals also found that the record contained evidence that the plaintiff had actual notice of the hearing and authorized his union to represent him before the Board. (This, in part, because in paragraph 39 of his Complaint, petitioner contended that the Brotherhood refused to take his claim to the Board, so he filed suit against the Brotherhood which he dismissed when the Union agreed to submit the "claim on his behalf to the Board". Attached hereto as Appendix E is a copy of pertinent portions of the Complaint.) This Court has already settled the matter of notice as required under the Act, 45 U. S. C. § 153 First (j), in the case of *Elgin, Joliet and Eastern Ry. Co.* v. *Burley*, 325 U. S. 711 (1945), *affirmed on rehearing*, 327 U. S. 661 (1945). In its first decision this Court advised that if the collective bargaining agent appeared before the Board and purported to act for the employee, and was authorized to do so by the employee, there was sufficient notice. *Id.* at p. 738. On rehearing, the Court noted that there is a very strong presumption that the union acted properly as having the authority of the employee to represent him. *Id.* at 664-667. Thus, there must be some affirmative showing by the petitioner that he did not in fact authorize the Brotherhood of Maintenance of Way Employees to represent him before the Board. By not raising the matter before the District Court and offering evidence, the petitioner failed to sustain this burden.

Petitioner also contends, in his formulation of the reasons for granting the Writ, that the Brotherhood of Maintenance of Way Employees did not receive notice of the hearing. ("The record is completely devoid of any notice to either the petitioner or the Union . . .") This contention was not made at any stage of the proceedings below and this question was not raised by petitioner as a question presented here for review. Petition at p. 2. Further, five of the ten members of the Third Division are selected by the Brotherhood and the other National Labor Organizations of the

employees, 45 U. S. C. § 153 First (h), to represent them on the Third Division. Finally, the Brotherhood was filing submissions and otherwise involved in the case from its conception at the Board, and was advised after submissions were completed that the case was set down for hearing before the division. We submit that the issue of whether or not there was proper notice of the hearings on the claim of petitioner is hardly a special and important question.

F. SUMMARY.

Of the questions presented for review by petitioner, only two are viable legal questions. The first is whether the award violated petitioner's due process rights under AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES. The second is whether the Board gave due notice to petitioner of its hearing on his claim.

The argument by petitioner as to due process rights is hard to understand, since it confuses the statutory grounds for review of an award as set forth in Section 3 First (q) of the Act. 45 U. S. C. § 3 First (q). Basically, the argument deals with the finding on the merits which are the sole province of the Board. The argument also deals in part with the standard of proof required by the Board to prove the contention of petitioner that his resignation was coerced. As the Court of Appeals mentioned, it is questionable whether the standard was that required to prove a defendant guilty in criminal matters before the Court. But assuming this was the standard, it was one that had been employed by the Board previously, the Court said. Finally, the Court said that on the record the Referee would have denied the claim even if he did (and we think he did) apply the preponderance test. It is clear, we believe, that there are no special and important questions presented for this Court's review in the Petition as to "due process".

Petitioner is barred from presenting for review any question of notice since he failed to assert the issue before the District Court. Further, petitioner had notice under the case of *Elgin, Joliet and Eastern Ry. Co.* v. *Buriey*, 325 U. S. 711 (1945), *affirmed on rehearing*, 327 U. S. 661 (1945). (Further, as the complaint alleges, his union waived his right to oral hearing.)

Petitioner says the Krinakis affidavit supports him. The Referee said it did not. Petitioner really wants only to argue the facts, as his petition shows. The Court of Appeals for the Seventh Circuit once said:

> "The Supreme Court . . . time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. . . . Appellant, therefore, cannot come before this or the District Court complaining that the award of the Railroad Adjustment Board was based on insufficient evidence or that the Board incorrectly interpreted or wrongfully applied a provision of a collective bargaining agreement." *Edwards* v. *St. Louis-San Francisco Railroad Company*, 361 F. 2d 946, 952 (7th Cir. 1966).

G. CONCLUSION.

Respondent, Elgin, Joliet and Eastern Railway Company, prays that the Petition for Writ of Certiorari herein be denied since it does not present any special and important reasons for granting the review requested.

Respectfully submitted,

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APPENDIX A.

Opinion of District Court Entered March 29, 1974.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 73 C 213 Date March 29, 1974

Title of Cause

Triantafyllos Kotakis v. Elgin, Joliet and Eastern Railway Company and Brotherhood of Maintenance of Way Employes.

The above captioned cause has come before this Court on cross-motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on Count I. After a careful review of the briefs filed by both parties and a review of the record filed by the Referee of the National Railroad Adjustment Board, Third Division, Award Number 19556, filed January 10, 1973, defendant's motion for Summary Judgment is hereby granted and plaintiff's motion for Summary Judgment is hereby denied. The Court finds that the record shows no deprivation of due process, as has been pleaded in Count I of the Petition for Review and Complaint. Further, this Court finds that the Award did conform and confine itself to matters within the scope of the Third Division's jurisdiction. Finally, this Court finds that the record does not show any statutory grounds for reversing and/or for remanding that Award.

Cause is continued to April 24, 1974 at 10:00 a.m for further status report.

Apr. 1, 1974 W. J. Lynch

APPENDIX B.

Opinion of District Court Entered April 26, 1974.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 73 C 2131 Date April 26, 1974

Title of Cause

Triantafyllos Kotakis v. Elgin, Joliet & Eastern Railway Company and Brotherhood of Maintenance of Way Employees. Defendant Elgin, Joliet and Eastern Railway Company's Motion for Entry of Final Judgment Pursuant to Rule 54b.

Names and Addresses of moving counsel

W. Gerald Thursby and John V. Ryan, III, 208 South LaSalle Street, Chicago, Illinois 60604.

Representing

Defendant.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Michael B. Roche, David M. Allen, Roger J. McFadden, Hubachek, Kelly, Rauch & Kirby, 3220 Prudential Plaza, Chicago, Illinois 60601, Plaintiff.

Ordered that Count 3 of the Petition for Relief & Complaint, is hereby dismissed as against deft. E. J. E. Rwy. Co. Ordered, that final judgment granted in favor of Deft. E. J. & E. Rwy. Co. and against ptff. Kotakis as regards Count 1 of the Petition for Review & Complaint, Further Ordered, that there is no just reason for delay in the entry of this judgment or an appeal therefrom.

Apr. 29, 1974 (Draft)
W. J. L.

APPENDIX C.

Statutory Provisions.

45 U. S. C. § 153 First (1).

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees."

45 U. S. C. § 153 First (h).

"The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

* * * * *

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees."

APPENDIX D.

Citations to Cases and Authorities.

Elgin, Joliet & Eastern Ry. Co. v. *Burley*, 325 U. S. 711 (1945), *affirmed on rehearing*, 327 U. S. 661 (1945).

Shelley v. *Kraemer*, 334 U. S. 1 (1947).

Slocum v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1949).

Gunther v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 (1965).

Laday v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 422 F. 2d 1168 (7th Cir. 1970).

Brotherhood of Railroad Trainmen v. *Central of Ga. Ry. Co.*, 415 F. 2d 403 (5th Cir. 1969), *cert. den'd*, 396 U. S. 1008 (1969).

Edwards v. *St. Louis-San Francisco Railroad Company*, 361 F. 2d 946 (7th Cir. 1966).

Whitson v. *Aurora Iron & Metal Co.*, 297 F. 2d 106 (7th Cir. 1961).

APPENDIX E.

Pertinent Portions of Complaint.

"39. Specifically, in breach of its duty of fair representation to the plaintiff, the Brotherhood arbitrarily, discriminatorily, in bad faith and as a result of hostile discrimination towards plaintiff, committed the following acts and/or omissions:

* * * * *

b. The Brotherhood failed and refused to submit plaintiff's claim to the National Railroad Adjustment Board until induced and forced to do so by plaintiff's filing of an action in the United States District Court for the Northern District of Illinois, Eastern Division, captioned 'Triantiflos Kotakis v. Elgin Joliet and Eastern Railroad Company'—Civil Action No. 71 C 2864. This action, brought at plaintiff's own effort and expense, was voluntarily withdrawn when the Brotherhood finally agreed to submit a claim on his behalf to the N. R. A. B.

* * * * *

f. The Brotherhood waived plaintiff's right to oral hearing before the Third Division of the National Railroad Adjustment Board, which right is guaranteed if requested by a party under the provisions of the Railway Labor Act, in particular, by 45 U. S. C. § 153 First (k) wherein the Third Division is vested with authority to empower two or more of its members to conduct hearings and make findings upon disputes."